POLICE DEPARTMENT

The City of New York

In the Matter of the Disciplinary Proceedings	:	
- against -	:	FINAL
Police Officer Mark McRae	:	ORDER
Tax Registry No. 935293	:	OF
Fleet Services Division	:	DISMISSAL

Police Officer Mark McRae, Tax Registry No. 935293, having been served with written notice, has been tried on written Charges and Specifications numbered 2019-19988 and 2019-19997, as set forth on form P.D. 468-121, both dated January 15, 2019, and after a review of the entire record, Respondent is found Guilty.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Mark McRae from the Police Service of the City of New York.

DERMOT F. SHEA
POLICE COMMISSIONER

EFFECTIVE: 7/19/21

POLICE DEPARTMENT

June 23, 2021

In the Matter of the Charges and Specifications	:	Case Nos.
- against -	:	2019-19988
Police Officer Mark McRae	:	2019-19997
Tax Registry No. 935293	:	
Fleet Services Division	:	

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Josh Kleiman
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Daniel Rabaev, Esq.
Daniel Maurer, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Michael Martinez, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2019-19988

1. Police Officer Mark McRae, assigned to the 90th Precinct, on or about and between October 11, 2018 and October 14, 2018, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that Police Officer McRae wrongfully ingested Marijuana and or cannabinoids without police necessity or authority to do so.

   P.G. 203-10, Page 1, Paragraph 5 GENERAL REGULATIONS

2. Police Officer Mark McRae, assigned to the 90th Precinct, on or about and between October 11, 2018 and October 14, 2018, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that Police Officer McRae wrongfully possessed Marijuana and or cannabinoids without police necessity or authority to do so.

   P.G. 203-10, Page 1, Paragraph 5 GENERAL REGULATIONS

Disciplinary Case No. 2019-19997

1. Police Officer Mark McRae, assigned to the 90th Precinct, on or about and between January 4, 2019 and January 7, 2019, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that Police Officer McRae wrongfully ingested Marijuana and or cannabinoids without police necessity or authority to do so.

   P.G. 203-10, Page 1, Paragraph 5 GENERAL REGULATIONS

2. Police Officer Mark McRae, assigned to the 90th Precinct, on or about and between January 4, 2019 and January 7, 2019, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that Police Officer McRae wrongfully possessed Marijuana and or cannabinoids without police necessity or authority to do so.

   P.G. 203-10, Page 1, Paragraph 5 GENERAL REGULATIONS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on May 19 and 20, 2021. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Dr. Barry Sample and Dr. Joseph Ciuffo as its witnesses. Respondent called Sergeant Lesly Charles as a witness and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having

reviewed all of the evidence in this matter, I find Respondent guilty of each of the charged specifications in both disciplinary cases and recommend that he be DISMISSED from the New York City Police Department.

ANALYSIS

It is undisputed that on January 6, 2019, Respondent was informed by the US Army that a random drug test he had been administered on October 14, 2018, as part of his service as a reservist at Fort Dix, New Jersey, had resulted in a positive for marijuana. He immediately reported the result to the Department, and underwent a Department drug test, which was also positive for marijuana. According to Respondent, he suspected that a vaping oil he was using to quit smoking was responsible for his positive result. A Department lab confirmed Respondent's suspicion, finding that the vape oil and vape pen contained THC, one of many naturally occurring cannabinoids in marijuana. The parties stipulated as to this sequence of events and tests. At issue is whether Respondent possessed and ingested the prohibited substance[1] accidentally or whether Respondent knew or should have known that he possessed and ingested the narcotic.

Dr. Barry Sample of Quest Diagnostics testified that he reviewed the A and B samples provided by Respondent. The test results were positive for the primary marijuana metabolite, carboxy-THC, far above the cutoff level. (Tr. 70-71, 76-103, 109)

Dr. Joseph Ciuffo testified that, as NYPD Deputy Chief Surgeon, he regularly reviews positive drug screening results, which are forwarded to him by the Drug Screening Unit. Respondent's test results showed a marijuana metabolite level of 79 ng/mL, while the

[1] Despite the recent repeal of certain marijuana laws in the State of New York (*see* the Marihuana Regulation and Taxation Act, signed into law by Governor Cuomo on March 31, 2021), marijuana remains a Schedule 1 Controlled Substance at the federal level and remains a prohibited substance within the Department.

Department cutoff is 15 ng/mL. As part of his normal investigative procedures, Dr. Ciuffo made arrangements to speak privately with Respondent about the results. Dr. Ciuffo attempts to speak privately with any officer who has tested positive before making a final determination in order to rule out certain innocent explanations for a positive test result. As an example, Dr. Ciuffo stated that an officer could test positive for codeine after taking cough syrup. In those circumstances, Dr. Ciuffo would make a final determination of "negative." He clarified, however, that accidental ingestion is not recorded as a negative outcome. Nevertheless, Respondent declined Dr. Ciuffo's invitation to speak with him "on the advice of counsel." Dr. Ciuffo, thereafter, "made a final verification that Respondent had tested positive for marijuana." (Tr. 118-24, 128, 134-37, 140-41, 144)

Dr. Ciuffo explained that there would be a "noticeable difference" between nicotine and marijuana for the user. As he described, nicotine is a "vasoconstrictor," which constricts the blood vessels of the body, and raises the blood pressure and heart rate of the user. THC, on the other hand, is "a psychoactive substance," which produces a "euphoric effect on the body" and can affect "motor function, cognitive function," and result in "motor impairment." (Tr. 125)

Dr. Ciuffo did not recall learning that Respondent had self-reported failing a prior drug test administered by the Army, nor had IAB told him that Respondent believed a vaping oil may have caused the positive result. Nevertheless, Dr. Ciuffo stated that such information would not have changed his final determination. (Tr. 125, 138, 147)

Sergeant Lesly Charles, the assigned Department investigator, testified that on January 6, 2019, Respondent self-reported that he had tested positive for marijuana as a result of a military drug test he was administered. As a result, Sergeant Charles met with Respondent on January 7 to conduct an official Department interview and to ensure a Department drug test was administered to Respondent. Sergeant Charles vouchered the vape pen and oil that Respondent

turned over to the Department; both items were sent to the Department's Police Laboratory and subsequently tested positive for THC. Respondent also provided the name and contact information for Person A from whom he said he received the oil. (Tr. 152-56, 159, 162, 165)

Sergeant Charles acknowledged that when he spoke to Respondent's military chain of command he learned that Respondent was not being expelled from the military and was considered "a great soldier." As part of his investigation, Sergeant Charles also learned that Respondent had a clean record with the Police Department and the Department of Corrections. Sergeant Charles further searched Respondent's garbage for marijuana paraphernalia, but found nothing. (Tr. 168-72, 180)

Sergeant Charles further testified that he had interviewed Person A several times, confirming that Person A and Respondent were friends and that Person A had provided a vaping oil to Respondent. Due to Person A unavailability at trial, the transcripts of Sergeant Charles's interviews with Person A were entered into evidence over the Department's objection. (Tr. 155-56, 175-79)

In a January 17, 2019, telephone call between Sergeant Charles and Person A Sergeant Charles asked Person A about the vape oil; Person A immediately answered, "Man, I got in trouble for the same shit too because I didn't know that – we didn't know that…it had THC." Person A stated that he had used the oil, which he too received from a friend, because he wanted to wean himself off the oxycodone he had been prescribed after a car accident. Person A asserted that he did not know the liquid contained THC when he gave it to Respondent. Person A subsequently had a drug test at work and "got in trouble." He stated that he did not specifically warn Respondent about the oil's THC content after this positive test because he had given it to several friends and forgot he had given it to Respondent; he further stated that it had

been awhile since he had seen Respondent and that he did not see him regularly. (Resp. Ex. C: 3-8)

During an in-person interview between Sergeant Charles and Person A on January 29, 2019, Person A altered his story in one respect, claiming that he had first learned that the vaping oil contained THC from Respondent after Respondent's positive test result when Respondent had called him to tell him that he had "fucked him." Person A denied that Respondent had asked him to lie or had coached him. Person A continued to refuse to disclose from whom he originally got the vape oil. He admitted that he had been arrested before, but stated that Respondent had no knowledge of his criminal history. He explained that he was with Respondent when he offered him some of the oil to try. He stated that the oil smelled like caramel rather than marijuana. (Resp. Ex. E: 4-9)

Respondent testified that, in addition to his service as a police officer, he became an Army reservist in September 2001 and is now a sergeant with the Army. He has deployed three times abroad, including nine months in Afghanistan, where he served in combat. In the past, he helped administer drug tests with the military, and has been tested approximately a dozen times. Until the drug tests herein discussed, he always tested negative for banned substances. Respondent admitted that the military provided him with 120 hours of drug testing training, but denied that he ever learned that vape oil could contain marijuana. (Tr. 188-93, 206, 220-23)

Respondent asserted that he began vaping because he wanted to quit smoking. His friend, Person A gave him a vape oil, which he used 3-4 times a week over the course of months. Respondent admitted that the oil came in a clear, unlabeled bottle, and was brown in color; but that he had never purchased vape oil before and did not know whether the bottle looked different from what is available in stores. Respondent said he assumed that Person A would not give him a banned substance because Person A knew that Respondent worked for the NYPD and the US

Army. He denied noticing any difference in how he felt after vaping with this oil compared to smoking tobacco. (Tr. 200, 204-06, 214-19)

On January 6, 2019, while at Fort Dix, Respondent's Army commanding officer called him into his office. Respondent assumed the conversation was about military logistics. Instead, to his surprise, he learned that he had failed a drug test that had been administered by the military in October 2018. As a result, he immediately notified his NYPD Integrity Control Officer. His best guess as to how he could have tested positive was that, unbeknownst to him, the vape oil from Person A contained THC. He told IAB about the vape pen and oil, both of which he handed over. After the positive result from his Department drug test, Respondent refused to talk to Dr. Ciuffo about the results on the advice of counsel. Ultimately, the Army did not punish Respondent in any way for the positive test because it accepted his explanation of accidental ingestion and changed the result to "negative." Respondent remains an active member of the Army. (Tr. 194-202, 207-08, 212-14)

A Department lab tested Respondent's vape pen and the vaping oil Respondent claimed he had received from Person A Both tested positive for THC. According to the Department, the lab informed them that they do not test the levels of THC present in the items they test, only whether there is any presence of THC. (Resp. Exs. A-B; Tr. 263-64)

Both cases charge Respondent with ingesting and possessing marijuana. Respondent does not dispute that he ingested and possessed marijuana; rather, he claims that he did so unknowingly. The defense of accidental ingestion is an affirmative defense, requiring Respondent to prove accidental ingestion by a preponderance of the credible evidence. *See Green v. Sielaff*, 603 N.Y.S.2d 156 [1st Dept 1993]. I find that Respondent has failed to meet this burden.

Despite Person A 's reluctant statements and the variations in his story concerning when he first discovered that the vaping oil contained THC, I find no reason in the record to question Person A 's and Respondent's consistent statements that Respondent received the vaping oil from Person A and that at the time Respondent received the vaping oil from Person A he had no knowledge that it contained THC. Furthermore, I find that Respondent testified in a credible manner and the Department provided no evidence to discount Respondent's testimony, as partially corroborated by the Department lab results, that the vaping oil he used was the source of the marijuana he ingested that resulted in his positive test results. Accordingly, Respondent successfully proved by a preponderance of the evidence that when he first received the vape oil he did not know it contained THC and that the vape oil resulted in his positive test results.

Nevertheless, Respondent did not convince this Tribunal that he *used* the vaping oil without feeling the effects of the psychoactive substance it contained. Dr. Ciuffo testified persuasively about the noticeable difference between THC and tobacco. As an admitted habitual smoker who claimed he did not use marijuana, it is unlikely that Respondent would have failed to notice the psychoactive effects when switching to a vape oil containing marijuana, especially considering the frequency and regularity with which Respondent admitted using the vape oil.

The standard applied in drug testing cases not only encompasses knowing possession and/or ingestion, but also encompasses circumstances in which an officer *should have known* that the substance at issue contained a prohibited substance. An officer who willfully ignores telltale signs of the possession and/or ingestion of prohibited substances is not absolved of the obligation to answer for a positive test result. Here, Respondent knowingly accepted and frequently ingested a substance from an unlabeled bottle, with, as Respondent would have it, no knowledge of what the mystery substance contained. These actions combined with the likely psychoactive effects Respondent would have felt from using the vape oil would more likely than not have

alerted a reasonable police officer to the marijuana-like properties of the vape oil. Furthermore, it is not credible that as an experienced police officer, and an individual with significant prior drug training, Respondent did not know that a vape oil could contain marijuana, not to mention other prohibited substances. That Respondent made no attempts to discover the ingredients of the vaping oil prior to his positive test result was willfully ignorant under the facts and circumstances of this case.

Department precedent is quite clear that MOS are responsible for the substances that they voluntarily ingest. *Disciplinary Case No. 2015-13367* (June 21, 2016) (Trial Commissioner declined to find any mitigation where a four year police officer pled guilty to using opiates that he obtained from his mother, which he believed were only pain medication; ADCT noted that the officer had a duty only to possess and ingest drugs that he himself obtained lawfully); *Disciplinary Case No. 2014-11090* (June 16, 2015) (Nine year police officer found guilty of smoking marijuana despite claims that it was a small amount mixed with tobacco and that he might have received it by accident from foreign soldiers while serving with the military abroad); *see also Disciplinary Case No. 2017-17354* (Feb. 1, 2018) (ADCT rejected thirteen year police officer's mitigation testimony that he accidentally ingested steroids, because he "should have been keenly aware that the products he purchased could contain anabolic steroids or agents"); *cf. Disciplinary Case No. 2009-251* (Dec. 17, 2012) (finding fifteen year police officer not guilty because "there is a lack of evidence to establish that Respondent knew *or should have known* that the treatment he was receiving was inappropriate") (emphasis added).

At trial, Respondent's counsel argued that Respondent should be found not guilty of the specifications related to his positive drug test from the Army because the Army refused to share any details of the test with the Department. Respondent, however, is not charged with testing positive; he is charged with the possession and ingestion of marijuana over a period of four days

in October 2018. Respondent admitted that he both possessed and ingested the vape oil during this time period (Tr. 54, 200, 205). News of the positive result for marijuana from the Army test, as reported and testified to by Respondent, served only to corroborate Respondent's admission. That the Army ultimately changed the positive test result to "negative," not for scientific reasons, but because the Army accepted Respondent's accidental ingestion rationale, is not binding on the Department.[2]

The Department's zero tolerance policy for the possession and/or ingestion of Schedule 1 Controlled Substances, among other substances, by uniformed members of the Department is ubiquitously known within the Department and strictly enforced. To permit Respondent to benefit from the defense of accidental ingestion where Respondent should have known that an unknown vaping oil he regularly smoked contained a prohibited substance would undermine this policy.

Accordingly, I find Respondent guilty of each of the charged specifications in both disciplinary cases.

PENALTY

In order to determine appropriate penalties, the Tribunal, guided by the Department Disciplinary System Penalty Guidelines ("Disciplinary Guidelines"), considered all relevant facts and circumstances, including any aggravating and mitigating factors established in the record. Respondent's employment history was also examined (*see* 38 RCNY § 15-07). Information from

[2] It should be noted, however, that even if Respondent had been found Not Guilty of the specifications dated at the time on the Army drug test, the result would be the same. In the instant matter, the penalty for one instance of wrongful possession and ingestion of a controlled substance is the same as it would be for two such instances.

Respondent's personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent, who was appointed to the Department on July 1, 2004, has been found guilty of possessing and ingesting marijuana. As a nearly seventeen-year police officer with no prior discipline and a history of decorated military service, Respondent is a sympathetic figure. Respondent is known within the Department to be "highly competent" and within the Army to be a "great soldier." In order to be effective and uniformly enforced, however, a zero tolerance policy must, by necessity, make no provision for the quality of one's character and the excellence of their prior performance; when enforced, both the saint and the reprobate are punished. The penalty required by the Disciplinary Guidelines in this matter is unyielding; it requires Termination and provides for no mitigated penalty. Accordingly, it is my duty to recommend that Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,

Josh Kleiman
Assistant Deputy Commissioner Trials

APPROVED
JUL 19 2021
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER MARK MCRAE
TAX REGISTRY NO. 935293
DISCIPLINARY CASE NOS. 2019-19988 &19997

Respondent was appointed to the Department on July 1, 2004. On his last three annual performance evaluations, Respondent received an overall rating of "Exceeds Expectations" for 2017, 2019 and 2020.

Respondent has no disciplinary record. In connection with the instant matter, he was suspended without pay from January 7, 2019 through February 27, 2019. Respondent was placed on Level II Discipline Monitoring on March 21, 2019; that monitoring remains ongoing.

For your consideration.

Josh Kleiman
Assistant Deputy Commissioner Trials